Petition

81-820

No. ———

Office - Supreme Court, U.S.
FILED
OCT 30 1981
ALEXANDER L. STEVAS,
CLERK

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

———

ROBERT "BOBBY" TAYLOR

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

———

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

———

WILLIAM C. OLDFIELD
213 East Fourth Street
P.O. Box 1078
Covington, Kentucky 41012
1-606-261-5777
ATTORNEY FOR PETITIONER

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

QUESTION PRESENTED FOR REVIEW

IS IT PROPER TO PERMIT A KEY GOVERNMENT WITNESS TO TESTIFY TO THE OUT-OF-COURT DECLARATIONS OF COCONSPIRATORS UNDER THE COCONSPIRATOR EXCEPTION TO THE DEFINITION OF HEARSAY, FEDERAL RULE OF EVIDENCE 801 (d) (2) (E), PRIOR TO PRESENTATION OF ANY INDEPENDENT EVIDENCE THAT A CONSPIRACY EXISTED OR THE MEMBERSHIP OF THAT CONSPIRACY?

PARTIES TO THE PROCEEDINGS

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

PLAINTIFF: UNITED STATES OF AMERICA

DEFENDANTS: EUGENE MASON ALLEY
ROBERT "BOBBY" TAYLOR
JAMES KNIGHT
WAYNE DREWRY
VERNON MAHANA

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES TO PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF CASES AND AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	2
CONSTITUTIONAL PROVISIONS INVOLVED AND FEDERAL RULES OF EVIDENCE	2
STATEMENT OF THE CASE	3
REASONS TO ALLOW WRIT OF CERTIORARI	8
CONCLUSION	12
APPENDIX	
Exhibit A	1a
Judgment and Commitment Order in case number 78-37 in the United States District Court for the Eastern District of Kentucky filed on March 21, 1980.	
Exhibit B	3a
Opinion of the United States Court of Appeals for the Sixth Circuit filed on August 12, 1981.	
Exhibit C	7a
Order of the United States Court of Appeals for the Sixth Circuit filed on September 14, 1981.	

Page

Exhibit D 8a

Relevant portions of the transcript of proceedings at the trial of this case in the United States District Court for the Eastern District of Kentucky.

TABLE OF CASES AND AUTHORITIES

Cases Cited: Page

Glasser v. *United States*, 315 U.S. 60 (1942) 8, 9, 10, 12

United States v. *Bell*, 573 F.2d 1040 (8th Cir. 1978) 9, 10

United States v. *James*, 590 F.2d 575 (5th Cir. 1979) (en banc), *cert. denied*, 442 U.S. 917 (1979) 8, 9, 10, 11, 12

United States v. *Macklin*, 573 F.2d 1046 (8th Cir. 1978), *cert. denied*, 439 U.S. 852 (1978) 8

United States v. *Martorano*, 561 F.2d 406 (1st Cir. 1976), *cert. denied*, 435 U.S. 922 (1978) 9

United States v. *Nixon*, 418 U.S. 683 (1974) 8

United States v. *Petersen*, 611 F.2d 1313 (10th Cir. 1979), *cert. denied*, 447 U.S. 905 (1980) 9

United States v. *Vinson*, 606 F.2d 149 (6th Cir. 1979) 7, 8, 9, 10, 11, 12

United States v. *Ziegler*, 583 F.2d 77 (2nd Cir. 1978) 9

Statutes and Rules:

18 U.S.C. § 371 3

18 U.S.C. § 1341 3

18 U.S.C. § 1343 3

18 U.S.C. § 2314 3

Federal Rules of Evidence 104 9, 12

Federal Rules of Evidence 801 (d) (2) (E) 8

No. ————

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

————

ROBERT "BOBBY" TAYLOR

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

————

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

————

The Petitioner, Robert Taylor, by his counsel, prays that a Writ of Certiorari issue to review the Judgments and Orders of the United States Court of Appeals for the Sixth Circuit entered in this case on August 12, 1981, and September 14, 1981.

OPINIONS BELOW

No written Opinion regarding the issue in this case was filed or published by the United States District Court for the Eastern District of Kentucky. The oral ruling of the court is at pages 8a-11a of the Appendix to this Petition. The Opinion of the United States Court of Appeals for the Sixth Circuit affirming the Judgment of the District

Court is at pages 3a-6a of the Appendix to this Petition and has not been officially reported to this date. The Order of the Sixth Circuit denying Petitioner's Petition for Rehearing was entered on September 14, 1981, and is at page 7a of the Appendix to this Petition.

JURISDICTIONAL STATEMENT

The Judgment of the United States Court of Appeals for the Sixth Circuit was entered on August 12, 1981. The Sixth Circuit denied the Petition for Rehearing on September 14, 1981. Jurisdiction of this Court is based on 28 U.S.C.A. § 1254 (i).

CONSTITUTIONAL PROVISIONS AND FEDERAL RULES OF EVIDENCE

AMENDMENT SIX:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

RULE 104 (a):

> "Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subsection (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges."

RULE 104 (b):

> "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon or subject to the introduction of evidence sufficient to support a finding of the fulfillment of the condition."

RULE 801 (d) (2) (E):

> "A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."

STATEMENT OF THE CASE

Petitioner was charged, along with four others, in an eighteen count indictment with conspiracy and participation in four schemes that defrauded the interest of finance and leasing companies in encumbered mining equipment in violation of 18 U.S.C. §§ 371, 1341, 1343, 2314. The indictment alleged a series of transactions in which the several defendants purchased encumbered mining equipment, or acquired mining companies in possession of encumbered equipment, and sold the equipment to innocent purchasers without notification of the interest of the finance or leasing companies. A jury trial on the indictment began at the federal courthouse in London, Kentucky, before Honorable Eugene Siler, Jr., Judge, on January 28, 1980, and ended on March 5, 1980. Petitioner, Robert Taylor, was found guilty on counts one, two and nine through seventeen and was sentenced to five years and a ten thousand dollar fine on count one, with sentence suspended on all other counts. (Appendix pp. 1a-2a)

The case presented at trial by the United States rested primarily on the testimony of two members of the alleged conspiracy: James Randall (J.R.) Durham and Vernon Mahana. The United States acknowledged that Durham was the founder and prime mover of the conspiracy. Durham was the first witnes called in the trial and he testified as to every aspect of the conspiracy and the participation of each member of the conspiracy. Durham's testimony

was composed largely of the statements of other members of the conspiracy – hearsay that was admitted against Petitioner under the coconspirator exception to the definition of hearsay prior to introduction of any evidence independent of Durham's testimony. Mahana, the last witness to testify for the United States, was indicted as a member of the conspiracy and testified as to his part as a front man in the transfer of equipment purchased by Durham and others in three of the four schemes.

The first of the four schemes alleged by the United States involved purchase of equipment from Padco, Inc. Durham was allowed to testify as to his contact and conversation about Padco, Inc. with Defendant, Eugene Alley. Durham, operating under the corporate guise of Consolidated Coal Corp., testified that he contacted Padco, Inc. and arranged to purchase their heavy mining equipment. Durham testified that he was made aware that Westinghouse Credit Corp. had a financial interest in the equipment and promised to continue making payments on the equipment. Durham testified that Petitioner arranged to haul the heavy equipment from the Padco, Inc. premises. Durham/Consolidated Coal bought the equipment and transferred some of it directly to innocent purchasers. Durham transferred the rest of the Padco, Inc. equipment to Defendant Alley, operating under the corporate guise of Whitley Sunshine Coal Co., who transferred the equipment to innocent purchasers. Petitioner received four thousand dollars from Alley/Whitley Sunshine for moving the Padco, Inc. equipment. Durham then "sold" Consolidated Coal Corp. to a non-existent coal company.

The second scheme alleged by the United States involved the purchase of Wolfe County Mining Co. and sale of its leased equipment. Durham testified in reference to a discussion that he had with Defendant Alley and Petitioner

about Wolfe County Mining Co. The owner of Wolfe County Mining Co. testified that he dealt only with Durham, to whom he sold all outstanding shares in Wolfe County Mining for one hundred one thousand dollars. Durham was aware that the equipment used by Wolfe County Mining was owned by Beacon Leasing Co. All of the alleged conspirators were present when the Beacon Leasing equipment was moved from the Wolfe County Mining premises. Durham arranged the sale of the Beacon Leasing equipment, with Alley's Whitley Sunshine Coal Co. as seller to an innocent Georgia buyer. "Bills of Sale" from Wolfe County Mining to Whitley Sunshine Coal were signed by Vernon Mahana. Durham testified that Petitioner Taylor helped remove equipment from the Wolfe County Mining site. Petitioner received a heavy hauler truck and a Chevrolet Blazer, for which he paid four thousand dollars, for his labor.

The third scheme alleged by the United States involved the purchase of the High Carbon Coal Co. and sale of its equipment. Durham was allowed to testify in reference to discussions with Defendant Alley, Petitioner Taylor and the owners of the company about High Carbon Coal Co. The owner of High Carbon Coal testified that he dealt only with Durham and Mahanan. Mahana, operating under the corporate guise of Industrial Investors Corp., bought all of the outstanding shares in High Carbon Coal for ninety thousand dollars. Part of the purchase price was a fifteen thousand dollar check to C.I.T. Credit Corp., with which the High Carbon Coal equipment was financed, to give an appearance of good faith. The equipment was loaded onto trucks by Taylor and removed from the High Carbon premises by Durham, Defendant Knight, Defendant Alley, Defendant Drewry, and the innocent purchaser from Georgia. Mahana/Industrial Investors Corp.

sold some equipment to third parties and sold some High Carbon Coal equipment to Alley/Whitley Sunshine, who sold to innocent purchasers. Petitioner Taylor received a mining drill for his labor. He sold the drill to a third party and took the drill back when the third party questioned title to it.

The last scheme alleged by the United States involved the purchase of J & S Coal Co. and sale of its equipment. Durham did not participate in planning the scheme, but testified to bankrolling the scheme. Mahana testified in reference to discussions he had with Defendant Alley and Petitioner Taylor about the J & S Coal deal. Mahana testified that Taylor told him details about heavy coal mining equipment before they met with the J & S Coal owners. A down payment of ten thousand dollars was made on the deal with a Whitley Sunshine Coal Co. check. Defendant Alley furnished Mahana with all of the money for the purchase. The equipment possessed by J & S Coal was encumbered by interests of C.I.T. Credit Corp. and Westinghouse Credit Corp. Mahana, under the corporate guise of Energy Investors Corp., sold the J & S Coal equipment to Defendant Knight. The J & S Coal equipment was not traced to ultimate purchasers. Petitioner Taylor received none of the J & S equipment.

Petitioner Taylor was convicted of planning the Padco, Inc. transaction. (App. pp. 1a-2a) Durham's hearsay testimony about conversations Durham had with the owners and coconspirators and conversation that he and Petitioner had about Padco, was the only evidence that Petitioner planned the Padco scheme. Taylor moved the Padco equipment for Durham and received four thousand dollars in return. Taylor was acquitted on the Wolfe County Mining Co. charges. Taylor was convicted of the High Carbon Coal Co. and J & S Coal Co. charges. Dur-

ham's hearsay testimony that Taylor participated in a conversation about High Carbon Coal was the only evidence of Taylor's participation in planning that scheme. Otherwise, Taylor's participation in the High Carbon Coal scheme was limited to receipt of a piece of equipment in return for his labor in moving the equipment from the High Carbon Coal site. Taylor received none of the J & S Coal equipment. There was also evidence that Taylor did extensive grading and excavation for Durham's personal residence.

Taylor appealed the verdict and Judgment of the district court to the United States Court of Appeals for the Sixth Circuit. The grounds for the appeal were: (a) that it was improper to restrict impeachment of Durham on past false swearing and participation in similar transactions; and (b) that it was improper to allow Durham and Mahana to testify to hearsay declarations, admitted under the coconspirator exception to the definition of hearsay, when there was no proof independent of Durham's testimony that a conspiracy existed or the membership in that conspiracy. The Sixth Circuit rejected both grounds, adhering to its opinion in *United States* v. *Vinson*, 606 F.2d 149 (6th Cir. 1979), and stating that extensive impeachment had already been allowed. The Sixth Circuit refused to rehear the case. This Petition for Writ of Certiorari is to review the Sixth Circuit's decisions.

REASONS TO ISSUE WRIT OF CERTIORARI

Federal Rule of Evidence, 801 (d) (2) (E) carves out an exception from the definition of hearsay for out-of-court declarations that are made by a coconspirator during the course and in furtherance of a conspiracy, when those declarations are introduced against the party opponent. A conflict has arisen among the United States Circuit Courts of Appeals on the appropriate method to admit testimony under this hearsay exception. *Compare, e.g. United States* v. *James,* 590 F.2d 575 (5th Cir. 1979) (en banc), *cert. denied,* 442 U.S. 917 (1979) and *United States* v. *Macklin,* 573 F.2d 1046 (8th Cir. 1978), *cert. denied,* 439 U.S. 852 (1978) with *United States* v. *Vinson,* 606 F.2d 149 (6th Cir. 1979). The opinion of the United States Supreme Court that deals directly with this issue predates the July 1, 1975, effective date for the Federal Rules of Evidence. *See, Glasser* v. *United States,* 315 U.S. 60 (1942).

In *Glasser,* an Assistant United States Attorney was prosecuted for taking money in return for squelching tax evasion investigations. Several issues were discussed in that case but the Court clearly held that declarations of coconspirators are admissible only if there is proof *aliunde* that the defendant and the out-of-court declarant are members of the conspiracy. *Glasser,* 315 U.S. at 74-75. The rationale of *Glasser* is fundamental — if hearsay is inherently suspect, then it cannot, of itself, justify being excepted from the general rule excluding hearsay; that is to say, inherently incompetent evidence cannot pull itself up to the level of competence by its own bootstraps. *Id.* In 1974, this *Glasser* holding was reaffirmed in *United States* v. *Nixon,* 418 U.S. 683, 701 n.14 (1974). The Sixth Circuit rejects the need for *Glasser* after enactment of the Federal Rules of Evidence. *United States* v. *Vinson,*

606 F.2d 149 (6th Cir. 1979). The Fifth Circuit finds *Glasser* to be a necessary protection of the fact finding process from highly prejudicial and unreliable evidence.

> "Such evidence [evidence excluded by *Glasser*] endangers the integrity of the trial because the relevance and apparent probative value of the statements may be so highly prejudicial as to color other evidence even in the mind of a conscientious juror, despite instructions to disregard the statements or to consider them conditionally."

United States v. *James*, 590 F.2d 575, 579 (5th Cir. 1979) (en banc). *Accord, United States* v. *Petersen*, 611 F.2d 1313 (10th Cir. 1979) *cert. denied*, 447 U.S. 905 (1980); *United States* v. *Ziegler*, 583 F.2d 77 (2d Cir. 1978); *United States* v. *Bell*, 573 F.2d 1040 (8th Cir. 1978).

Rule 104 of the Federal Rules of Evidence, draws *Glasser* into question. *See, e.g. United States* v. *Martorano*, 561 F.2d 406 (1st Cir. 1976), *cert. denied*, 435 U.S. 922 (1978). Rule 104 (a) provides that admissibility of evidence is to be determined by the trial court and the court is not bound by the rules of evidence in making that determination. Rule 104 (b) then states that evidence may be admitted upon the condition that a fact be proven subsequently to support its admission. Therefore, there are three possible methods for introduction of hearsay under the co-conspirator exception:

> 1) Admit the hearsay on the condition that the conspiracy be proven later in the trial;
>
> 2) Require the non-hearsay testimony to be presented first in the trial and existence of the conspiracy be proven prior to admisison of the hearsay;
>
> 3) Hold a hearing prior to the trial at which the conspiracy must be proven in order to have the hearsay admitted at trial.

Some circuit courts have recognized that the first alternative can violate the *Glasser* principle and have taken steps to protect against admission of hearsay excluded by *Glasser* by requiring the court to announce the basis for admission of the coconspirator hearsay. *See, e.g. United States* v. *Bell,* 573 F.2d 1040 (8th Cir. 1978). The Sixth Circuit erects no preference among the three alternatives and takes no precautions against *Glasser* type bootstrapping. *United States* v. *Vinson,* 606 F.2d 149 (6th Cir. 1979). The Fifth Circuit creates a preference against conditional admission of the hearsay whenever practicable. *United States* v. *James,* 590 F.2d 575 (5th Cir. 1979) (en banc).

The Sixth Circuit and the Fifth Circuit are at odds on both considerations in the issue before the Court: (1) they split on the continued validity of *Glasser,* with the Fifth Circuit being supported by other circuits, and (2) they split on whether the hearsay can be conditionally admitted. In the case at hand, the Sixth Circuit's *Vinson* opinion allowed hearsay testimony to be conditionally admitted prior to any proof that a conspiracy existed and allowed the court to consider the hearsay in its determination of its admissibility. The Fifth Circuit in *James* would not have permitted Durham's testimony to be admitted in that fashion, or in any other fashion.

The conflict between the circuits is perfectly presented to the Court in this case. This case involved a complicated conspiracy to defraud financing companies of their interest in mining equipment in which they had an interest. The United States Attorney exploited *Vinson* to its greatest extent – the founder and prime mover of the conspiracy, James Randall Durham, was the first witness presented. Durham testified about each scheme and transaction alleged and testified about conversations he had

with the alleged co-conspirators regarding these schemes and transactions. No evidence other than Durham's testimony showed the existence of a conspiracy, its duration, or its membership when the hearsay was admitted under the coconspirator exception. Over strenuous objection, Durham was allowed to testify to the content of conversations admissible only under the coconspirator exception. (App. p. 10a) Petitioner Taylor was connected to the conspiracy in two ways: (1) Durham's hearsay testimony of his participation in the conspiracy and (2) he helped move the heavy equipment from two of the three sites and received payment for his labors. Durham's hearsay testimony was crucial to the conviction of the Petitioner.

After Durham testified, the United States presented many witnesses and evidence showing the course of the transactions in detail. This evidence showed the mechanics of the alleged fraudulent schemes and the contact between buyers and sellers of equipment with members of the conspiracy. Very little of this testimony was about the out-of-court declarations of coconspirators. Except for Durham, recalling witnesses to present hearsay testimony would have been minimal if the *James* method had been used instead of the *Vinson* method. In the evidence independent of Durham's testimony, proof of Taylor's participation in the conspiracy was limited to hauling heavy equipment and being paid with proceeds of the sale of that equipment or receiving a piece of equipment in kind. Under *James*, this independent evidence would have been presented prior to Durham's hearsay and must have been sufficient, on its own, to show the existence of the conspiracy and Taylor's participation in it, prior to admission of Durham's testimony. Instead, under *Vinson*, Durham's testimony was admitted without any safeguard or guarantee that it was reliable or accurate.

CONCLUSION

The decision of the Sixth Circuit in this case and in *Vinson* are at odds with the Fifth Circuit in *James* and this Court in *Glasser*. The passage of Federal Rule of Evidence 104 has caused the circuit courts to struggle with the question of the continued validity of *Glasser*. *James* appropriately determined that Rule 104 did not change the need to protect the fact finding process from the contamination of the hearsay that *Vinson* would admit and that *Glasser* would exclude. The lower courts are at odds over the effect of an often used rule of evidence and need the guidance to be gained from a Supreme Court Opinion on this matter. Under the guidelines of Rule 17 of the Rules of the Supreme Court, this is an important issue of law that merits review on Writ of Certiorari.

Respectfully Submitted,

COBB & OLDFIELD

WILLIAM C. OLDFIELD

P.O. Box 1078-213 E. 4th Street
Covington, Kentucky 41012
1-606-261-5777

ATTORNEY FOR PETITIONER

APPENDIX

UNITED STATES DISTRICT COURT FOR
EASTERN DISTRICT OF KENTUCKY
LONDON

Docket No. 78-37

UNITED STATES OF AMERICA

vs.

ROBERT "BOBBY" TAYLOR,
Defendant

JUDGMENT AND PROBATION/COMMITMENT ORDER

* * *

In the presence of the attorney for the government the defendant appeared in person on this date – March 19, 1980

* * *

☒ WITH COUNSEL – WILLIAM OLDFIELD

* * *

There being a verdict of ☒ GUILTY Cts. 1 through 17

Defendant has been convicted as charged of the offenses of Conspiracy, in violation of Title 18, Section 371, United States Code; Fraud by wire, radio or television in violation of Title 18, Section 1343, United States Code; and Interstate Transportation of falsely made and forged security,

goods, wares, merchandise or money in violation of Title 18, Section 2314.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

COUNT 1 – FIVE (5) YEARS – FINE – $10,000.00

It is ADJUDGED that the imposition of sentence in Cts. 2 and 9 through 17 is suspended and the defendant is placed on probation for a period of FIVE (5) YEARS to begin upon his release from custody after serving the sentence imposed in Ct. 1.

Imprisonment on above sentence is stayed for a period of 14 days and the defendant may report directly to the institution designated by the Bureau of Prisons.

It is FURTHER ADJUDGED that the Sentences on Cts. 2 and 9 through 17 shall be consecutive to that imposed in Ct. 1 although the sentences on Cts. 2 and 9 through 17 are not imposed at this time.

1. The defendant shall return to the Finance Company the drill, trailer and Mack truck cab.
2. The defendant shall pay the $10,000.00 fine within the first four years of his period of probation supervision.

A presentence report was submitted to the Court before imposition of sentence & copies of report were furnished to counsel pursuant to Rule 32, F.R.C.P.

* * *

/s/ EUGENE E. SILER, JR., JUDGE

* * *

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 80-5117, 80-5118, 80-5119

UNITED STATES OF AMERICA

Plaintiff-Appellee,

v.

ROBERT "BOBBY" TAYLOR (80-5117),
JAMES KNIGHT (80-5118),
WAYNE DREWRY (80-5119),

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Kentucky

---

(Decided and Filed August 12, 1981)

Before: EDWARDS, Chief Judge; LIVELY, Circuit Judge; and WISEMAN,* District Judge.

PER CURIAM. The defendants appeal from their jury convictions for conspiracy, fraud and interstate transportation of stolen property. The jury found that the defendants carried forward a conspiracy to defraud finance and

---

* The Honorable Thomas A. Wiseman, Judge, U.S. District Court for the Middle District of Tennessee, sitting by designation.

leasing companies by four similar fraudulent schemes. The case for the government was based largely on the testimony of two of the alleged conspirators, one of whom testified under a grant of immunity, and the other under a plea bargain by which the United States dropped all but one charge against him. Only one defendant-appellant, Wayne Drewry, challenges the sufficiency of the evidence. The court has examined the record and has determined that the evidence was sufficient to support a jury conviction of Drewry.

All defendants contend that the district court erred in admitting hearsay testimony of Durham under the co-conspirator exception to the hearsay rule. This argument boils down to a request that this court reverse its decision in *United States* v. *Vinson,* 606 F.2d 149 (6th Cir. 1979), *cert. denied,* 444 U.S. 1074 (1980). This court adheres to its decision in *United States* v. *Vinson* and holds that the district court did not err in the admission of Durham's testimony.

The defendants-appellants also contend that the district court erred in limiting cross-examination of Durham concerning similar past activities in which he engaged. The district court considered the objections to the limitation of cross-examination and concluded that the particular questions were inadmissible under Rule 608 of the Federal Rules of Evidence. The government points out that the jury already knew of Durham's prior conviction and knew that he was a prime mover in the illegal activities which were the subject of the trial and argues there was no abuse of discretion in holding that the particular evidence sought on cross-examination was inadmissible. In view of the extensive knowledge which the jury had about the witness' past activities, we find no abuse of discretion or prejudice to the defendants in the rulings complained of.

The defendants-appellants also contend that the district court erred in its instructions on conspiracy. The court has examined the instructions and finds them to be correct.

The defendant Knight asserts that the record discloses a conflict of interest between him and his attorneys. The record does disclose that documents pertaining to this trial were taken from the United States Attorney's office prior to the trial and that an investigation of this disappearance was underway when the trial began. Among those questioned were the two attorneys who represented Knight. On appeal it is argued that these attorneys were aware that they were under investigation and were probably suspected of having had the purloined documents in their possession at some time prior to the beginning of the trial. Knowing this, appellate counsel argues, these attorneys may have pressed the defense of Knight's claim with less vigor than they would have if these circumstances had not existed. They point to the fact that Knight neither took the stand nor offered any evidence at the trial.

The recent Supreme Court decision in *Wood* v. *Georgia*, — U.S. —, 101 S. Ct. 1097, 1104 (1981), indicates that where a possibility of a conflict of interest on the part of counsel in a criminal case is sufficiently shown, a duty is imposed upon a trial court to inquire further. We believe there has been a sufficient showing of the possibility of a conflict in the present case to require such further injury.

We find no merit in any of the claims of error made on behalf of the defendants Taylor and Drewry and none in any other claim of error on behalf of the defendant Knight. Accordingly, the convictions of Taylor and Drewry are affirmed. We remand the appeal of Knight to the district court for the inquiry required by *Wood* v. *Georgia*. The district court will determine whether any actual conflict of interest existed and, if so, whether Knight

was prejudiced thereby. The district court will transmit a supplemental record to this court following conclusion of the proceedings on remand. Jurisdiction is retained to consider this issue further when the supplemental record is received.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 80-5117

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROBERT "BOBBY" TAYLOR,

Defendant-Appellant.

ORDER

(Filed September 14, 1981)

Before: EDWARDS, Chief Judge; LIVELY, Circuit Judge; and WISEMAN,* District Judge.

Upon receipt and consideration of the petition for rehearing filed herein the court concludes that the questions raised therein were fully considered upon the original submission and decision of this appeal and that rehearing is not required.

The petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

---

* The Honorable Thomas A. Wiseman, Judge, U.S. District Court for the Middle District of Tennessee, sitting by designation.

EXCERTS FROM TRANSCRIPT OF PROCEEDINGS

[WITNESS: JAMES RANDALL DURHAM]

* * *

[53] Q. Was Mr. Alley present when you talked with Tony Lannum?

A. One time, I think.

Q. And did he at that time advise you that Padco was for sale?

A. He did.

Q. Did he tell you who the owners of Padco were?

A. He did.

Q. Who was that?

A. Mr. and Mrs. Aubrey Chesnut.

Q. What did he do after he learned who the owners of the company were?

A. He went and tried to purchase that company.

Q. Who did he talk with?

A. Mrs. Chesnut.

Q. After talking with her, did he later enter into any kind of a contract for a bill of sale?

A. I did.

MR. TREVEY: Your Honor, at this time, I would request the Marshal to give to defense counsel for inspection what has been premarked for identification purposes as Exhibit Number 2 and hand it to the witness.

[54] (Government's Exhibit 2, a bill of sale for equipment from Padco to Consolidated Coal Company, was shown to counsel.)

MR. ROSE: Your Honor, may we approach the bench?

THE COURT: All right.

(At the bench.)

MR. ROSE: Your Honor, it has been stated by this witness that at this point in time only he and Mr. Alley

were engaged in a conspiracy of the buying and selling of Padco. Therefore, your Honor, we would respectfully object, or I guess my best shot is to ask for an admonition so stating to the jury that these things that are done with Padco are not in furtherance of the— at this point, not in furtherance of the conspiracy as far as James Knight is concerned.

MR. TREVEY: I don't think that the jury should be admonished at this time. There has been no testimony as to whether James Knight is concerned. And until such time as he should come up and the Court make a finding that he is included in the conspiracy, I don't see how it is prejudicial to Knight in any way thus far. We have got to build a house one brick at a time.

MR. ROSE: Your Honor, he says— I mean Mr. Durham has now said when they asked who was there, Mr. Alley and me. Anybody else? And the answer was, No, sir, if I didn't make a mistake in writing that down. Now, this action to Padco is [55] between Gene Alley and him and Mr. and Mrs. Chesnut, he testifies. Now, he said some other one by the name of Tony Lannum. We must object to any part and request an admonition as to the other defendants other than those, since it does not appear to be in furtherance of the conspiracy. That is my motion.

THE COURT: Well, the Court of Appeals in the Enwright Case and the—

MR. TREVEY: Thompson.

THE COURT: Thompson, I was going to say Vinson.

MR. TREVEY: Vinson and Thompson.

THE COURT: Has suggested that the jury not be admonished where we have statement made in furtherance of a conspiracy, that is alleged to be in furtherance of a conspiracy, but to wait until later and make a finding because otherwise these admonitions are confusing to the

jury. And what you tell them is these statements are not admissible against those who weren't there unless you later find that there was a conspiracy with those defendants who weren't there and there was a conspiracy, then at a later time you can relate it back to them. That's too confusing so we will let it in on the condition that it was during the furtherance of the conspiracy, during the time of the conspiracy and in furtherance of the conspiracy. And if any person joins the conspiracy at a later time they are bound by the acts [56] and declarations of the conspirators at the outset.

MR. OLDFIELD: Your Honor, I think it's the *US versus James,* Fifth Circuit Case, which requires the United States to produce the proof and, Number 1, establish the existence of the conspiracy prior to the time that they admit the hearsay. It's going to be a real problem. We are going to have a lot of conversations come in here before we have any conspiracy established.

THE COURT: I think the Sixth Circuit rejected that method in one of these cases, whether it is *Thompson* or *Vinson.*

MR. TREVEY: That's the same case.

THE COURT: O.K. I will overrule that. And I will let the US proceed.

MR. ROSE: All right. Now, I don't want to, your Honor, I don't want to interrupt the Court in any way along this same line. I would like— I guess then—

THE COURT: You want a continuing objection?

MR. ROSE: And then I will just wait. I want a continuing objection and then I will wait and move for an admonition, I guess, later.

THE COURT: All right. You may have a continuing objection to any statement made out of the presence of your client by some other—

MR. OLDFIELD: Also, your Honor, I would like the same objection.

[57] THE COURT: That will apply for all defendants.

* * *